TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 185

ARTHUR E. DONEGAN, APPELLANT,

vs.

B. E. DYSON, AS UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF FLORIDA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED OCTOBER 2, 1935

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 19, 1925

[fol. 1] **IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA**

ARTHUR E. DONEGAN, Petitioner,

vs.

B. E. DYSON, as U. S. Marshal for the Southern District of Florida, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 8, 1924

To the Honorable Rhydon M. Call, Judge:

The Petition of Arthur E. Donegan shows the following:

1. That in the United States District Court for the Southern District of Florida and in the Tampa Division he was indicted lately on, to-wit, the 5th day of March, 1919, charged with the offenses of misapplication and of abstraction in violation of the banking laws of the United States.

2. That thereafter and at a subsequent term of said Court held in said Division he was tried, convicted and sentenced to a term of three years' imprisonment in the Atlanta penitentiary.

3. That your petitioner sued out a writ of error from said conviction and in the Circuit Court of Appeals for the Fifth Circuit said conviction was affirmed. A motion for rehearing was made by your petitioner and by that Court denied; and thereafter a petition for the sanction of a certiorari was filed in the Supreme Court of the United States and denied by that Court. The mandate of the United States Circuit Court of Appeals for the Fifth Circuit was in due course sent to and filed in this Court, and an order of this Court has been [fol. 2] lately made directing the issuance of a commitment for your petitioner, which commitment has been issued and lodged with the United States Marshal for the Southern District of Florida.

4. That in pursuance of said commitment your petitioner is now in the custody of said United States Marshal, who holds your petitioner for delivery to the United States penitentiary at Atlanta, Georgia, forthwith.

5. Your petitioner alleges that his trial, conviction and sentence was unauthorized, illegal and of no effect whatever and his present detention by respondent is illegal, for the following reasons:

(a) Said term of this Court held at Tampa, Florida, at which your petitioner was tried, convicted and sentenced, was presided over and held by Hon. Julian W. Mack; that said Judge Julian W. Mack was one of the five additional United States Circuit Judges appointed at or about the time of the creation of the Court of Commerce, created by virtue of the Act of June 18, 1910; and was one of the Judges assigned

by the President of the United States to that Court; that thereafter, by Act of Congress provided to take effect December 31, 1915, the said Court of Commerce was abolished and its jurisdiction vested in the United States District Court; that the several Judges of said Court of Commerce remained during good behaviour U. S. Circuit Judges subject to designation for service from time to time in certain courts of the United States as by Acts of Congress then and thereafter provided; that the said Julian W. Mack came to the Southern District of Florida and acted or professed to act as the Judge of the said District Court in the said trial of your petitioner, claiming his jurisdiction, power and right to do so under and by virtue of a designation of himself to sit as said Judge at said term by the Honorable the Chief [fol. 3] Justice of the United States, a copy of which order of designation is hereto annexed, especially referred to and made Exhibit A and a part hereof.

(b) That the designation of the said Circuit Judge by the said Chief Justice was not authorized by section 201 of the Judicial Code, as amended, because said section 201 was repealed by the Act of October 22nd, 1913, and that if any jurisdiction or power was conferred on the said Julian W. Mack by virtue of said order of Chief Justice that it conferred on him only such power and jurisdiction as a Circuit Judge of the Fifth Circuit had at that time in a District Court within the Fifth Circuit.

(c) Your petitioner further shows that neither at the date of the designation of said Julian W. Mack by the Chief Justice to preside in said District Court, nor at any time prior to or including the trial, conviction or sentence of your petitioner, had any one of the Circuit Judges of the Fifth Circuit, been authorized, designated or empowered to hold the District Court of the United States at which your petitioner was tried, convicted and sentenced.

(d) Your petitioner alleges the facts to be, that prior to the designation of the said Julian W. Mack to hold the above mentioned Court in said District, no action whatever in regard to said designation was taken by the Clerk of this Court; or the presiding judge of the Circuit Court of Appeals for the Fifth Circuit, or any of the Circuit Judges for the Fifth Circuit; or the Circuit Justice for said Fifth Circuit, or the Chief Justice of the United States, authorizing any one of the Circuit Judges for the Fifth Circuit to hold the Tampa term of the said United States District Court; that the necessity for Judge Julian W. Mack or any other District or Circuit Judge to hold said Court was [fol. 4] never certified or determined in any of the ways required by law, and that the said Julian W. Mack in the trial, conviction and sentence of your petitioner was entirely without either jurisdiction or power necessary to give validity and effect to any of the proceedings in the trial, conviction and sentence of your petitioner.

Your petitioner alleges that giving full faith to all of the recitals and terms of the order of designation, Exhibit A hereto, and to the presumptions to be indulged therefrom, that yet the facts are (and the contrary is not recited in or to be implied in said order) that none

of the events had happened or conditions existed to authorize or validate either the said order of designation or the certificate of urgency and accumulation of business in said order recited, or to vest the said Julian W. Mack with jurisdiction or power to hold the said term of the United States District Court.

Your petitioner, upon the premises alleges that his restraint and detention by the United States Marshal under said process of commitment is unlawful; and that by reason of petitioner's trial, conviction, sentence, commitment and detention, he is and has been deprived of due process of law, all in violation of Article Five of the Amendments to the Constitution of the United States; and thereupon, he prays that a writ of habeas corpus may issue directed to the said United States Marshal, requiring him forthwith or at a convenient time to be fixed, to produce your petitioner before Your Honor in this Court, to dispose of your petitioner as law and justice require.

Arthur E. Donegan, Petitioner. Alexander Ackerman, Wm. M. Toomer, Attorneys for Petitioner.

[fol. 5] Sworn to by Arthur E. Donegan. Jurat omitted in printing.

[fol. 6] EXHIBIT "A" TO PETITION

Honorable Julian W. Mack, United States Circuit Judge, New York City, New York.

SIR: The Senior Circuit Judge of the Fifth Circuit having certified that on account of the accumulation and urgency of business in the United States District Court for the Southern District of Florida, it would be a great public advantage if you could be assigned to service in said District court, and your consent in writing to be designated and appointed to serve in said district court having been duly signed and exhibited to me, now, therefore, pursuant to the authority vested in me by section 201 of the Judicial Code of the United States as amended by the acts of congress approved October 22, 1913, I do Hereby Designate and Assign you for service in the District Court of the United States for the Southern District of Florida, during the period commencing January 20, 1923, and ending March 31, 1923 and for such further time as may be required to complete unfinished business.

Dated January 11th, 1923, Washington, D. C.,

Wm. H. Taft, Chief Justice of the United States.

UNITED STATES OF AMERICA,
Southern District of Florida:

I, Edwin R. Williams, Clerk of the United States District Court, in and for the Southern District of Florida, and as such the legal custodian of the records and files of said court, do hereby certify the

foregoing to be a true and correct copy of an order designating Judge Julian W. Mack to preside in the Southern District of Florida as the same appears of record and file in the office of the Clerk of said Court.

[fol. 7] Witness my hand and the official seal of said court this the 5th day of July, 1924.

Edwin R. Williams, Clerk U. S. District Court, Southern District of Florida, by Anna W. Williams, Deputy Clerk. (Seal.)

[File endorsement omitted.]

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING WRIT OF HABEAS CORPUS—Filed July 9, 1924

The foregoing petition with the Exhibit annexed thereto and the verification thereof having been duly filed in the office of the Clerk of this Court and presented to me.

And the United States Attorney expressing a wish to be heard at a later date.

It is thereupon considered, ordered and adjudged by the Court that the writ of Habeas Corpus be, and the same is by the terms of this order, issued; ordered further that a copy of this order be served on the United States Attorney and the Marshal of this District and ordered further that the said writ be made returnable before me at my Chambers in Jacksonville at ten o'clock A. M., July 18th, 1924.

Made and dated at Jacksonville, Florida, this July 9th, 1924.

Rhydon M. Call, United States Judge.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING PETITIONER TO BE AT LARGE—Filed July 9, 1924

The petitioner in the case above stated having filed and presented his petition for the writ of Habeas Corpus and the writ having issued made returnable before me at Jacksonville at ten o'clock A. M. on July 18th, 1924.

It is ordered that the petitioner, Arthur E. Donegan, until said hearing on July 18th, 1924, and until the further order of the

Court, be enlarged and at liberty under the supersedeas bond heretofore given by him in said cause and now of full force and effect.

Made and ordered at Jacksonville, Florida, this July 9th, 1924.

Rhydon M. Call, United States Judge.

[File endorsement omitted.]

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

MARSHAL'S RETURN TO THE WRIT OF HABEAS CORPUS—Filed July 18, 1924

Comes now the United States Marshal Southern District of Florida, and for return to the writ of habeas corpus herein made and entered shows unto the Court,

I. That at the date of the issuance of this writ the defendant Arthur E. Donegan was in custody of the United States Marshal by virtue of a final commitment issued out of the United States District Court, Southern District of Florida, a copy whereof is hereto attached and the original herein exhibited.

II. And the United States Marshal pursuant to the direction of said Writ of Habeas Corpus and the order subsequently made releasing said defendant on a supersedeas bond theretofore given by said defendant herewith produces said defendant in Court.

Respectfully submitted this July 18, A. D. 1924.

B. E. Dyson, United States Marshal, by N. L. Pinder, Chief Deputy.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

COMMITMENT

UNITED STATES OF AMERICA,
Southern District of Florida:

The President of the United States of America to the Marshal of the Southern District of Florida and the Warden or other Proper Officer of the United States Penitentiary at Atlanta, Ga., Greeting:

Whereas, Arthur E. Donegan has been convicted in the District Court of said District for violation of Section 5209 of the R. S. of the United States, by unlawfully Abstracting and Misapplying funds of a National Bank, and has been sentenced to be imprisoned by

confinement in the United States Penitentiary at Atlanta, Ga., for a term of Three years, on each of the 1st and 2nd counts of Indictment, sentence to run concurrently, and beginning from the date of his delivery to said penitentiary,

Now, these are therefore, in the name and by the authority aforesaid, to command you, the said Marshal, to commit the said Arthur E. Donegan to the custody of the Warden or other proper officer of the United States Penitentiary at Atlanta, Ga., and to leave with said Warden a certified copy of this Writ, and to command you, the Warden of said Penitentiary, to receive the said Arthur E. Donegan a prisoner of the United States of America, into your custody, in said Penitentiary, and him there safely to imprison by confinement for a term of three years, on each of the 1st and 2nd counts of the Indictment, sentence to run concurrently, and beginning from the date of his delivery to said Penitentiary, or until he be thence discharged by due course of law.

Witness the Honorable Rhydon M. Call, Judge of the said District Court of the United States, at Jacksonville, Fla., in said District, this 30th day of June, A. D. 1924.

Edwin R. Williams, Clerk U. S. District Court, Southern District of Florida, by Geo. T. Kilner, Deputy Clerk.

[fol. 12] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER REMANDING PETITION TO CUSTODY OF THE MARSHAL—Filed July 28, 1924

This cause coming on to be heard upon the petition, the writ of habeas corpus and the Marshal's return; and the same having been argued and submitted upon the motion of the petitioner that he be discharged from custody under the commitment heretofore issued out of this Court June 30th 1924; and the Court being advised of its judgment herein;

It is considered by the Court that said motion be and the same is hereby denied and said petitioner, Arthur E. Donegan be, remanded to the Custody of the Marshal of this District to be transported to the Atlanta Penitentiary pursuant to said commitment issued as aforesaid.

Upon application of the petitioner, it is ordered that he be allowed his writ of error from the Circuit Court of Appeals of the 5th Circuit, and that supersedeas bond in the sum of $5,000.99 be fixed. That upon the approval by the Marshal of said bond, the petitioner be released from the marshal's custody pending the hearing and determination of said writ of error.

Done and ordered at Jacksonville this July 25, 1924.

Rhydon M. Call, Judge.

[File endorsement omitted.]

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed July 25, 1924

W. M. Toomer, of Jacksonville, Florida, and Alexander Ackerman, or Orlando, Florida, Attorneys for Petitioner.

Maynard Ramsey, of Jacksonville, Florida, Assistant U. S. Atty., for the U. S. Marshal.

CALL, District Judge:

In this case the petitioner was convicted at the Tampa term of this Court, presided over by Judge Julian W. Mack, a Circuit Judge of the United States, appointed under the provisions for the appointment of five additional Circuit Judges in the Act establishing the Commerce Court. Judge Mack presided at the term of the Court by virtue of a designation made by the Chief Justice of the United States Supreme Court.

It is contended that Judge Mack was neither a Judge Defacto nor De jure in holding said term of the District Court. It is admitted by counsel for petitioner that in the event Judge Mack occupied either position, the petitioner must be remanded to the custody of the Marshal and the commitment executed.

In the designation of the Chief Justice, Section 201 of the Judicial Code is given as authority for the designation. That Sections reads as follows:

"The five additional Circuit Judges authorized by the Act to [fol. 14] create a Commerce Court * * * from time to time shall be designated and assigned by the Chief Justice of the United States for service in the District Court of any District, or the Circuit Court of Appeals for any Circuit, or in the Commerce Court, and when so designated and assigned for service in a District Court or Circuit Court of Appeals shall have the powers and jurisdiction in this Act conferred upon a Circuit Judge in his Circuit." (36 Stats. L. 1147.)

It is contended that this Section of the Judicial Code was repealed by the Act of October 22nd, 1913, Chap. 32. The pertinent portion of the Act reads as follows:

"And all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges, now acting as Circuit Judges by appointment under the terms of said Act, but such judges shall continue to act under assignment as in said Act provided, as judges of the District Courts and Circuit Court- of Appeals;".

It seems clear to me that Section 201 of the Judicial Code was not repealed by the Act abolishing the Commerce Court and that the

several provisions of the Code and Acts amendatory thereto as to the designation of District Judges to preside outside of their respective Districts or Circuit Judges to preside in District Courts in their Circuits have no bearing upon the question here at issue. It seems to me equally clear that Section 201 of the Judicial Code vests in the additional Circuit Judges appointed pursuant to the Act the jurisdition to preside in the District Court when so designated to do so by the Chief Justice. It therefore follows that under the facts shown in the petition and the return that the petitioner must be remanded to the custody of the Marshal that the commitment may be executed. [fol. 15] The petitioner having requested that in the event judgement should go against his petition, a writ of error from the Circuit Court of Appeals of this Circuit be allowed and a supersedeas bond be fixed, the request will be granted and supersedeas bond fixed at $5,000.00.

Judgment remanding the petitioner.

Rhydon M. Call, Judge.

At Jacksonville, Florida, this 25th day of July, 1924.

[File endorsement omitted.]

[fol. 16] In United States District Court

[Title omitted]

Petition for Appeal—Filed July 28, 1924

To Hon. R. M. Call, District Judge:

The above named Arthur E. Donegan, feeling aggrieved by the judgment, decree, and order, rendered in the above entitled case on the 25th day of July, A. D. 1924, does hereby appeal from the said judgment, decree, and order, to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and prays that his appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of said court in such cases made and provided, and your petitioner further prays that proper order relating to the security to be required of him be made.

W. M. Toomer, Alexander Akerman, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 28, 1924

Now comes the petitioner in the above entitled case and files the following assignment of errors upon which he will rely upon his prosecution of appeal in the above entitled cause from the judgment, decree, and order made by this Honorable Court on the 25th day of July, 1924:

1. The United States District Court for the Southern District of Florida erred in refusing to grant the motion of the petitioner that he be discharged upon the Marshal's return.

2. The court erred in refusing to hold that the conviction of petitioner in a district court presided over by a circuit judge other than a circuit judge of the Fifth Circuit, was a denial to petitioner of due process of law, as guaranteed to him by the Fifth Amendment to the Constitution of the United States.

3. The court erred in remanding petitioner to the custody of the United States Marshal for the Southern District of Florida to be transported to the Atlanta penitentiary pursuant to the commitment theretofore issued by said court.

4. The court erred in rendering a final judgment against petitioner denying his discharge upon the writ of habeas corpus and the return thereto.

Wherefore the petitioner prays that the said judgment, decree and order be reversed.

W. M. Toomer, Alexander Akerman, Attorneys for Petitioner.

[File endorsement omitted.]

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 28, 1924

On motion of Alexander Akerman and W. M. Toomer, Solicitors and Counsel for Petitioner, Arthur E. Donegan, it is hereby ordered that an appeal to the Supreme Court of the United States from the order, judgment and decree heretofore filed and entered herein, dated July 25th, 1924, be and the same is hereby allowed, and that a certified transcript of the record, exhibits and all proceedings be forthwith transmitted to the Supreme Court of the United States.

It is further ordered that the bond on appeal for costs and damages be and the same is hereby fixed at the sum of $1,000.00.

Ordered this 28th day of July, 1924.

Rhydon M. Call, Judge.

[File endorsement omitted.]

[fol. 19] CITATION—In usual form, showing service on B. E. Dyson; filed July 28, 1924; omitted in printing

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[fols. 20 & 21] BOND ON APPEAL FOR $1,000—Approved and filed Aug. 1, 1924; omitted in printing

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[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 13, 1924

To the Clerk of the District Court of the United States in and for the Southern District of Florida:

The appellant, Arthur E. Donegan, hereby requests you to make up a transcript of the record in this case for the Supreme Court of the United States, in accordance with the following instructions:

1. Copy petition for writ of habeas corpus and exhibit thereto annexed filed July 9, 1924.

2. Copy order of Court granting writ of habeas corpus filed July 9, 1924.

2 A. Copy of Order of Court July 9, 1924 allowing Petitioner to be at large on his original supersedeas bond pending the hearing of this Habeas Corpus proceeding.

3. Copy return of B. E. Dyson as United States Marshal to writ of habeas corpus, including exhibit thereto filed July 18, 1924.

4. Copy order and decree of court remanding petitioner, Arthur E. Donegan, to custody of the United States Marshal for the Southern District of Florida.

5. Copy opinion of court filed July 25, 1924.

6. Copy petition for appeal filed July 28, 1924.

7. Copy assignment of errors filed July 28, 1924.

[fol. 23] 8. Copy order allowing appeal.

9. Copy citation issued to B. E. Dyson as United States Marshal, which was filed July 28, 1924, and Marshal's acceptance of service.

10. Copy of cost bond.

11. Copy these instructions.

Alexander Akerman, W. M. Toomer, Attorneys for Petitioner, Arthur E. Donegan.

Service acknowledged of a copy of the foregoing præcipe this August 13th, 1924.

B. E. Dyson, U. S. Marshal, by N. L. Pinder, Chief Deputy.

[File endorsement omitted.]

[fols. 24 & 25] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, Edwin R. Williams, Clerk U. S. District Court, in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify the foregoing pages numbered from 1 to 23 inclusive to comprise a true and correct transcript of the proceedings in this Court in the case of Arthur E. Donegan vs. B. E. Dyson, United States Marshal for the Southern District of Florida, as the same appears of record in the records and files of this Court aforesaid.

Witness my hand and the official seal of this Court this 19th day of August, A. D. 1924.

Edwin R. Williams, Clerk U. S. District Court for the Southern District of Florida, by Susan F. Williams, Deputy Clerk. (Seal of District Court of the United States, Southern District of Florida.)

Endorsed on cover: File No. 30,644. S. Florida D. C. U. S. Term No. 185. Arthur E. Donegan, appellant, vs. B. E. Dyson, as United States Marshal for the Southern District of Florida. Filed October 2nd, 1924. File No. 30,644.